IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1951 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

JAYANTILAL CHANDULAL SHAH: Petitioner.

Versus

VISHNUBHAI B HARIBHAKTI: Respondent.

Appearance:

MR JITENDRA M PATEL, Advocate for Petitioners

Shri Sudhir I. Nanavati, Senior Advocate with Shri Sanjiv D. Dave, Advocate for Respondent.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 10/02/98

ORAL JUDGEMENT

Being aggrieved by the judgment and decree dated 9th April 1984, passed by the then learned Extra Assistant Judge, Baroda, in Regular Civil Appeal No. 190 of 1981 on his file, allowing the appeal, passing the decree of eviction & setting aside the decree, passed by the then learned Second Additional Small Causes Court Judge, Vadodara in Regular Civil Suit No. 1815 of 1975, dismissing the suit the original defendants in the suit have filed this revision application.

2. In order to appreciate the rival contentions, necessary facts may in brief be stated. Vishnubhai Bhagwandas Haribhakti and Bhagwandas Dahyabhai Haribhakti were the owners of a house situated in Shiva Dala's Khadki in Ladwada area of the city of Baroda. The whole of the ground floor of that building (for short the suit premises) is let to the applicant No.1 at the monthly rent of Rs. 25/-. The suit premises are consisting of two rooms and certain other open portion. The applicant No.2 is the brother of applicant No.1, Krishnalal, is the son of applicant No.2. The applicant No.2 with his family members was residing in the rented premises situated on the back of the building in which the office of Memon Tarkara Jamat is housed. From 1st May 1972 the applicant No.1 taking his belongings went to Karelibaug area where he hired one room at the monthly rent of Rs. 50/-. That room is situated in Shastri Park Society. It belongs to Bhikhabhai Becharbhai Rana. Initially, required amenities & facilities namely water-tap, latrine, kitchen, were wanting but later on Bhikhabhai Becharbhai Rana provided all the necessary facilities and amenities. After occupying the room belonging to Bhikhabhai Becharbhai Rana, the applicant No.1 sub-let or assigned his interest to his brother,the applicant No.2, who then occupied the suit premises. The opponents, who are the owners of the suit premises came to know that without their consent, unlawfully the applicant No.1 had sub-let the suit premises to the applicant No.2. A notice was then issued on 30th June 1972 calling upon the applicants to vacate the premises. The notice was received by the applicant No.1 on 3rd July 1972. The applicant No.1 then replied the notice, but did not vacate the suit premises. The opponents were then constrained to prefer Regular Civil Suit No. 1815 of 1975 in the Small Causes Court at Baroda to recover the possession of the suit premises and mesne profits etc. On 25th February 1981 the suit came to be dismissed. The opponents, who were aggrieved by the judgment and order, preferred Regular Civil Appeal No. 190 of 1981 in the District Court at Baroda. That appeal was transferred to the then learned Extra-Assistant Judge, Baroda, who, hearing the parties, allowed the appeal on 9th April 1984 and directed the present applicants to vacate the suit premises within a period of one year. Against that judgment and decree, the present revision application has been filed by the original-tenant and the sub-tenant.

3. Assailing the judgment and decree of the lower appellate court, it is contended that the learned Extra-Assistant Judge fell into error in appreciating the

evidence on record and reached erroneous conclusions against them. There was no evidence at all on record justifying to hold that the case of sub-letting was established, and on that count decree of eviction was required to be passed. The learned Extra-Assistant Judge proceeded to decide the appeal mainly on the basis of inferences and conjectures ignoring the evidence on record. His finding being perverse, the judgment and decree passed by him are required to be set aside and the judgment and decree passed by the trial court are required to be restored.

4. In reply to such submissions, Mr. Nanavati, learned counsel appearing on behalf of the opponents,has submitted that the ld. Extra Assistant Judge is perfectly right in passing the decree against the present applicants; no error has been made by the learned Appellate Judge. Taking me to the entire evidence he submits that there is no justification to interfere with the judgment and decree passed by the lower Appellate Court. According to him the scope of inquiry in such revision application being limited, it will not be open to me to reappreciate the evidence and substitute the findings of the lower Appellate Court.

5. Considering the rival contentions, I will first deal with the issue about my scope of enquiry in revision. A similar question arose before the Apex Court in the case of Helper Girdharbhai vs Mohmad Mirasaheb Kadri and others - AIR 1987 S.C. 1782 wherein it is laid down that while exercising revisional powers under Section 29(2) of the Bombay Rent Act, the High Court must ensure that the principles of law have been correctly borne in mind by the lower court, and secondly the facts have been properly appreciated and a decision arrived, taking all materials and relevant facts in mind. In order to warrant the interference, the decision must be such a decision which no reasonable man could have arrived at. Lastly, such decision does not lead to a miscarriage of justice. But in the guise of revision, substitution of one view where two views are possible, and the lower court has taken a particular view is not permissible. If a possible view has been taken the High Court would be exceeding its jurisdiction if it substitutes its own view in place of the view of the lower court because it considers it to be a better view. In another case of Union of India vs. Chandrakant Gordhandas Shah - J.T. 1994 (6) S.C. 47, it is laid down that the High Court erred in discussing the evidence afresh and in interfering or disturbing the finding of the trial court and also the appellate court, in its writ

jurisdiction. In that case, decree of eviction passed on the ground of unauthorised sub-lettee was restored holding that it was beyond the scope of enquiry by the High Court to reappreciate the evidence and substitute its finding. Again when the question arose before the Supreme Court in the case of Bhaichand Ratanshi vs. Laxmishanker Tribhoyan - AIR 1981 S.C. 1690 it is held that under Section 29 (2) of the Bombay Rent Act, although the High Court has a wider jurisdiction than the one exercisable under Section 115 of the Civil Procedure Code, its revisional jurisdiction can only be exercised for a limited purpose with a view to satisfying itself that the decision was according to law. Hence in a suit for eviction for bonafide requirement, when the lower courts had not failed to apply their mind to the requirements of Section 13 (2) of the Bombay Rent Act and the findings of the lower courts are not manifestly perverse or erroneous, the High Court could not substitute its own finding for the one reached by the lower courts on reapprisal of the evidence. This Court also has taken likewise view in the case of Smt. Kusumben Popatlal vs. Mahendrakumar Parmananddas Popat 16 G.L.R. 348 holding that the revisional jurisdiction of the District Court under Section 29 (3) of the Bombay Rent Act is limited to correct errors of law. Reappreciation of evidence and recording a different conclusion on facts are not the matters which fall within the realm of errors of law. While dealing with the similar question in the case of Rajgor Shantilal Shivji vs. Trustees of Jivibai @ Mongibai Will Trust Through Premji Haridas Pandhiyar & Ors. - 29 (2) Gujarat Law Reporter 802, this Court has made it clear that the revisional jurisdiction of the High Court as well as the District Court under Section 29 of the Bombay Rent Act is not as narrow as under Section 115 of the Civil Procedure Code. The court can satisfy itself that the judgment of the lower court is in accordance with law. If there is miscarriage of justice because of the mistake of law, the High Court can interfere with the decision of the lower court, but the High Court cannot reassess the value of the evidence and interfere with the finding of fact, merely because it thinks that the appreciation of the evidence by the lower court is wrong and the lower court should have reached a different conclusion of fact. Again, this court, while dealing with the question, in the case of B.D. Sahastrabuddhe Through His Heirs Balkrishna & Ors. vs Madhusudan Mahadev Dev - 37 (1) G.L.R. 428 reiterated the same principle about the revisional jurisdiction of this court. What can be deduced from such pronouncements is that the scope of enquiry while exercising revisional jurisdiction is

limited. Even if the revisional court on the question of fact is of a different view than the view of the lower court, the court cannot substitute its view holding that the same is better than what out of two possible conclusions the lower court has preferred to take. But the court exercising the revisional jurisdiction can interfere if there is error of law leading to patent injustice apparent on the face of record calling for prompt redressal and securing the ends of justice, or to correct manifestly perverse finding so as to prevent miscarriage of justice. I will, therefore, keeping my limited scope of enquiry in mind, consider whether the lower appellate court has fallen into any error of law leading to miscarriage of justice or whether on that point the findings are manifestly perverse.

6. It may be mentioned at this stage, that the lower appellate court has preferred to pass the decree of eviction on the ground of sub-letting. I have with meticulous care and finicky details examined the evidence on record and perused the judgments of both the courts below. I entirely agree with the lower appellate court, and when I generally agree with that court, it is not necessary to restate all those reasonings and hold that no error either of fact or law has been committed by the lower appellate court. For my such view, a reference of a case of Girijanandini Devi and Ors. vs. Bijendra Narain Choudhary - AIR 1967 SC 1124 may be made. However, in short, I may mention how the lower appellate court is right in passing the decree of eviction.

7. Section 13 (1)(e) provides a ground to the landlord to seek the decree of eviction on the ground of unlawful sub-letting or assignment or transfer of the rented premises in any other manner by the tenant. In order to succeed on such ground the initial burden of proving the case of unlawful sub-tenancy or assignment lies on the landlord. No doubt he has to show the exclusive possession of third one or a stranger to the contract of tenancy and valuable consideration. Once the landlord shows that the third person is in occupation and the tenant himself is not in the premises let to him, the burden of proving the nature of occupation of that third person and about consideration will shift to the tenant for a landlord is not expected to know agreed terms between his tenant and the occupant. He can inferentially say from the conduct of the parties and apparent state of things such as exclusive possession, independent use etc. The tenant is in the know of such facts and therefore it is for the tenant to discharge his burden by leading necessary evidence so as to show the

nature of occupation and that there is in fact no sub-letting or assignment as alleged by the landlord. As stated above for the proof of sub-letting, two ingredients are necessary; (1) exclusive possession; (2) valuable consideration, but in case of assigning transfer of the premises in any other manner putting some one in exclusive possession would also amount to a wrong affording of ground to the landlord for seeking a decree of eviction under Section 13 (1(e) of the Bombay Rent Act; and for my such view, a reference of a case of Harshachandra Narsibhbai Patel and Others vs Ibrahim Haji Khubanbhai - 1984 G.L.H. 965 may be made, wherein it is laid down that, if it is found that the premises were transferred for valuable consideration, it will certainly amount to sub-letting. Even if it is not possible to come to that conclusion, it would also amount to a transfer in any other manner, for Section 13 (1)(e) of the Bombay Rent Act is not confined merely to the act of unlawful sub-letting. The words "transfer in any other manner" would include a transfer in favour of a relative or a known person, once it is proved that he has left the premises and the transferee is put in exclusive possession. To give these words a restricted meaning and equate such transfer with sub-letting is to make that part of Section redundant.

8. The opponents-landlords have examined Navnitlal Ratanlal Parikh at Exh. 62. He is the independent witness. He has no reason to grind the axe against the present applicants. According to him,the applicant No.2 was formally residing in the building on the back of Memon Tarkara Jamat Office. Both the applicants Nos. 1 & 2 who are the brothers were thus residing separately in all respects and especially in food and residence as well as business. After the applicant No.1 left the suit premises and went to Karelibaug area to reside in the room belonging to Bhikhabhai Becharbhai Rana, for some time the suit premises remained closed & unused, but later on it came to be occupied and used by the applicant No.2. He had already vacated the premises on the back of Memon Tarkara Jamat Office. By passage of time the applicant No.2 constructed his new building. This witness was invited to attend the `Vastu' ceremony. He then in 1976-77 saw the applicant No.2 leaving the suit premises with all his belongings. The cart was being loaded with the household goods. Out of inquisition he questioned what the matter was ? The applicant No.2 replied that he was leaving the suit premises as the applicant No.1 had come back to the suit premises to reside. He then saw the applicant No.2 taking away all his belongings from the suit premises. His such evidence

is not virtually assailed and shaken in the cross-examination. From his evidence, what can be deduced is that once in past the applicant No.1 was occupying the suit premises and later on he left the suit premises and the same came to be occupied by the applicant No.2. After using and occupying the suit premises for few years, the applicant No.2 left the suit premises and the applicant No.1 came back to reside in the suit premises because the applicant No.2 constructed his new house and went to reside in his new house. Bhikhabhai Becharbhai Rana, who is the owner of a room in Karelibaug Society, is examined by the opponents at Exh. 49. It may be mentioned that as alleged by the opponents the applicant No.1 giving possession of the suit premises to his brother applicant No.2, started to reside in the room belonging to this witness. From the evidence of this witness, what is made clear is that the applicant No.1 started to use and occupy his room from 1st May 1972 at the monthly rent of Rs. 15/-. He was issuing the receipts to the applicant No.1. The applicant No.1 also signed the receipts, Exhibits. 51, 53 & 56. Initially, in the Column Bhadutnu Nam (Tenant's name), the name of applicant No.1 was mentioned, but later on the name of Krishnalal Jethalal Shah has been mentioned because as made clear by this witness that after the applicant No.1 received a notice from the opponents calling upon him to vacate on the ground of sub-letting, he requested this witness to issue the receipt in the name of his nephew, Krishnalal Jethalal Shah, the son of applicant No.2, and accordingly a change was made. A note about the request having been made and then the change that was effected is also made on the back of the Receipt Ex.54 which was, when tendered in evidence, not assailed by the applicants while cross-examining the opponents and their witnesses, and especially this witness Bhikhabhai Becharbhai Rana. When the statement is unassailed, the same should be deemed to have been accepted by the other side. This witness was then also called by opponents so as to verify the fact and confirm about sub-letting. He also made clear before the opponents that he had let his room to the applicant No.1 from 1st May 1972. At this stage, one of the contentions raised on behalf of the applicants may be dealt with. When applicant No.1 went to reside in the room of this witness from 1st May 1972, there was neither latrine, nor kitchen or water-tap, and therefore what is contended is that no one would leave the premises where all facilities are available and go to the place where essential facilities are lacking. The contention does not gain a ground to stand upon when the explanatory statement made by Bhikhabhai Becharbhai is taken into consideration. He made it clear in his evidence that

initially no doubt such facilities were not there but shortly after the applicant No.1 started to occupy the room he provided all those facilities. When all those facilities were then provided, there was no reason for applicant No.1 to leave that room as everything was convenient and comfortable to him.

9. Chandrakant Ratilal Parikh is the son-in-law of Dahyabhai Bhagwandas Haribhakti and is the power of attorney holder of the opponents. He has deposed at Ex.32 corroborating the case advanced by the opponents. According to this witness, both the applicants Nos. 1 & 2 were separate by food, residence and business. Once this witness was called by the applicant No.2 at Anand Kariyana Stores after the suit for eviction was filed. The applicant No.2 then requested this witness to act as a mediator and see that the matter was settled. He then assured that he would be paying more rent or would be increasing the rent if the dispute was settled. Such evidence relating to assurance also discredits the truth of the case in defence.

10. One more circumstance, may be of a little value, cannot be lost the sight of. Extracts from the Assessment Register of the Baroda Municipal Corporation are produced at Exs. 37 to 40 relating to the years 1973 to 1976. Those extracts relate to the premises of B.B. Rana situated in Karelibaug area of Baroda city. In that extracts, one of the portions of that building namely a room is shown to have been occupied by the applicant No.1. Of course, the entry in such extract registers are not the decisive factors and cannot be made the sole base to draw one or another conclusions, as they are not the documents of title and they neither create the title nor negative the same; but for the purpose of occupation and so as to see whether the case of particular party finds support or not qua occupation can be taken into account especially when the other side has not challenged the same. It may be also mentioned that for the purpose of assessment of the tax, i.e. fiscal purpose the entries are made and the taxes are assessed. The taxes are assessed on the annual letting value and for assessing or determining the annual letting value, necessary entries, if the premises are let, are made with necessary particulars collected by local Body either from the landlord or the tenant. In view of such facts, though the entries may have a little value and may not be the sole decisive factor, it can, as one of the circumstances on record, be considered. These unassailed entries show that the applicant No.1 was using and occupying the room belonging to Bhikhabhai Becharbhai Rana.

11. When the opponents issued the notice before filing the suit, the same was served at the address where the room belonging to Bhikhabhai Becharbhai Rana in Karelibaug Society area is situated. It is the case of applicant No.1 that he was serving in Krishna Masala Store and therefore a notice was served there and not because he was residing in the room. In support of his say, there is no iota of evidence on record establishing the case of employment or payment of salary. Why available evidence regarding employment is not led is also not explained.

12. The applicant No.1 has categorically admitted in his evidence that in 1974 A.D. the marriage ceremony of his nephew Krishnakant, the son of applicant No.2 was performed in the suit premises. A marriage can be performed at any place convenient & suitable, but explanatory evidence in that regard must be there on record. It is not made clear why the marriage was performed in the suit premises if at all the applicant No.2 was not occupying and using the suit premises as alleged. When no explanatory evidence is led, and as there is no reason to disbelieve the say of the opponents, this circumstance would also lead to believe that as the applicant No.2 was using and occupying the suit premises, the marriage ceremony was performed therein. If that was not the case, the applicant No.2 would have got performed the ceremony in the house on the back of the building wherein Memon Tarkara Jamat office is situated, which he was occupying formerly.

13. The cumulative effect of the above discussed evidence is that from 1st May 1972 the applicant No.1 left the suit premises putting the applicant No.2 into possession thereof. Thus, one of the ingredients of Section 13(1)(e) of the Bombay Rent Act is established. The respondents have therefore established the fact that third one, a stranger to the contract of tenancy is in possession of the suit premises.

14. About the consideration as stated above, the landlord will not be able to lead cogent evidence because the fact thereof would certainly be within the personal knowledge of the tenant and the sub-tenant. It is for the tenant to show that there is no consideration. In this case, except total denial, no evidence has been led by the tenant namely the applicant No.1. The lower appellate court, in the absence of any evidence showing the fact otherwise was perfectly right in reaching the conclusion that it was for the consideration. The

applicant No.1 has come forward with the case that he was serving in Krishna Masala Store which is a part of the house belonging to Bhikhabhai Becharbhai Rana. Krishnalal, his nephew the owner of the Store was paying the salary of Rs. 150/-. According to him, around the time the applicant No.2 vacated the suit premises, he left the services and Krishnalal stopped to pay him the salary. As stated above, no evidence about the employment and payment of salary has been led. When the party in know of the fact, without any reason omits to lead the evidence, the court is entitled to infer everything against him. It can, therefore, be assumed that the case about employment and salary, was made out so as to get out from the clutches of the law and for the purpose of avoiding the decree of eviction anyhow. When around the period after applicant No.1 vacated the suit premises, payment of salary of Rs. 150/- is stopped, what can be deduced from the above discussed evidence is that after the applicant No.2 constructed his new house he went there leaving the possession with applicant No.1, and since then it was not necessary for applicant No.2 to make payment of rent, a consideration of sub-letting to applicant No.1, and therefore under the guise and pretext of the salary, the rent that was being paid was stopped.

15. Even if for a while it is believed that there is no evidence pertaining to the consideration, the opponents cannot fail. As held in the case of Harishchandra Nathubhai Patel (Supra), if valuable consideration is established, the premises, if transferred will take a shape of sub-letting, but if consideration is not established or there is nothing to possibly come to the conclusion of a consideration, it would then amount to a transfer in any other manner which is also under Section 13 (1)(e) of the Bombay Rent Act, is made a ground for seeking the eviction decree. In this case, therefore, it can in the alternative be said that here is a case wherein transfer of the suit premises was made in any other manner though it may not be described as unlawful sub-letting which is also made a wrong under the Bombay Rent Act and that wrong, if committed by the tenant, the same provides a ground to the landlord for seeking the decree of eviction. The contention advanced on behalf of the applicant that as there is no evidence about the valuable consideration one of the ingredents being lacking no decree of eviction could have been passed, cannot be accepted.

16. For the aforesaid reasons, I find no error of law having been made by the lower appellate court. In all respects, the judgment and decree passed by the lower

appellate court being sound in law, are required to be maintained and this revision application, being devoid of merits, is required to be dismissed, and is accordingly dismissed with costs.

17. At this stage, Mr. J.N. Patel, learned advocate representing the petitioner requests the court to grant two years time to vacate the suit premises making it clear that the applicant will file his undertaking within the period of four weeks. Since 1975 the opponents are battling for the decree of eviction, and about 22 years have passed. The request made therefore does not appear to be just; but the learned advocate for the opponents consents to grant time. Consequently, period of 2 years from today is granted to vacate the suit premises on condition that within four weeks from today the petitioner shall, before this Court, file usual undertaking failing which two years time granted to vacate the suit premises shall be deemed to have been withdrawn & cancelled, and it will be open to the opponents to execute the decree as if 2 years' time is not granted. Rule discharged.

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(rmr).